

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 CA 1066

**FLASH GAS & OIL SOUTHWEST, INC.
AND STEVEN G. HALLER**

VERSUS

HARVEY A. KELLEY, JR.

Judgment Rendered: March 23, 2012

**Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Case No. C552542**

The Honorable Janice Clark, Judge Presiding

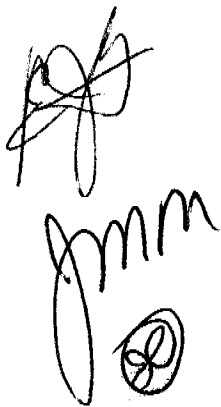
**Jerald L. Album
Michael T. Wawrzycki
Metairie, Louisiana**

**Counsel for Defendant/Appellant
Harvey A. Kelley, Jr.**

**Kyle Schonekas
Thomas McEachin
Suzanne M. Ciaccio
New Orleans, Louisiana**

**Counsel for Plaintiff/Appellee
Flash Gas & Oil Southwest, Inc.
and Steven G. Haller**

BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.



GAIDRY, J.

In this case, the defendant appeals a trial court judgment dismissing his reconventional demand as prescribed. We affirm.

FACTS AND PROCEDURAL HISTORY

On September 13, 2006, Harvey A. Kelley, Jr. filed a Statement of Privilege asserting a privilege against Flash Gas & Oil Southwest, Inc.'s ("Flash") interest in three oil wells in East Baton Rouge Parish, pursuant to the Louisiana Oil Well Lien Act, La. R.S. 9:4861-73. The basis for the privilege asserted by Kelley was that Flash owed him a 0.5% overriding royalty interest of Flash's interest in the wells for services rendered between June 2001 and February 2003 pursuant to an agreement between the parties. The "agreement" alleged by Kelley is based upon an April 28, 1998 proposal letter sent to him by Steven G. Haller, President of Flash, which provides as follows:

[Flash] would like to make the following proposal to you in regards to bringing opportunities to be reviewed by Flash.

Flash will review any opportunities submitted by you and will make payment for such information and services dependent on the stage of completion of the opportunity. The state of completion and consideration is summarized below:

- 1) Give Flash a lead on an opportunity only would be worth a .5% [overriding royalty interest].

Flash will make ½ payment upon execution of contracts consummating the trade or agreement with third party. Flash will make the other ½ payment upon project financing.

Kelley alleges that he presented Flash with a lead when he introduced Haller to Bob Gerdes, and that lead resulted in the drilling and production of three wells, thereby entitling him to the assignment of the 0.5% overriding royalty interest in those three wells.

Flash and Haller alleged that this purported "lead" did not provide a valid basis for asserting a privilege under La. R.S. 9:4862, and they filed suit against Kelley to have the lien or privilege dissolved and also seeking damages for the cloud that Kelley's lien placed on their title.

Kelley filed a reconventional demand on June 11, 2010, seeking compensation for his services rendered in accordance with the agreement, as well as attorney's fees and costs. Flash and Haller subsequently filed a peremptory exception raising the objection of prescription, asserting that the three year prescriptive period provided in La. C.C. art. 3494 applies to the claims raised in the reconventional demand, and under the facts as alleged by Kelley, those claims had prescribed prior to the time the reconventional demand was filed. The trial court sustained the exception, dismissing Kelley's claims with prejudice. Mr. Kelley filed this appeal.

DISCUSSION

Kelley argues on appeal that the trial court erred in finding that the applicable prescriptive period for his claim is the three-year prescriptive period set forth in La. C.C. art. 3494. He alleges that his reconventional demand makes a claim for a breach of contract, which would be subject to a ten-year prescriptive period.

The applicable prescriptive period is determined by the character of the action disclosed in the pleadings. *Raborn v. Gulf States Pipeline Corp.*, 41,974 (La. App. 2 Cir. 4/4/07), 954 So.2d 353, 355, writ denied, 07-0964 (La. 6/22/07), 959 So.2d 509, citing *Starns v. Emmons*, 538 So.2d 275 (La. 1989). The nature of the basic underlying action determines the appropriate prescriptive period. *Fishbein v. LSU Health Sciences Center*, 04-2482 (La. 4/12/05), 898 So.2d 1260, 1265. A personal action is subject to a liberative prescription of ten years *unless otherwise provided by law*. La. C.C. art.

3499. Louisiana Civil Code article 3494 provides an exception to the general rule of article 3499: A three-year liberative prescription period applies to actions for the recovery of compensation for services rendered, including payment of salaries, wages, commissions, tuition fees, professional fees, fees and emoluments of public officials, freight, passage, money, lodging, and board. La. C.C. art. 3494. The three-year prescriptive period provided by article 3494 commences to run from the day payment is exigible. La. C.C. art. 3495.

Kelley's reconventional demand claims that "Haller and/or Flash breached the terms of the proposal by failing to pay the agreed upon compensation for Mr. Kelley's services." Although Kelley alleges that his claim is for a breach of contract, it is clear from a review of the record that the object of any contract which may have existed between the parties was to provide various levels of compensation for services to be rendered. Thus, it is also clear that Kelley's claim is for payment of compensation for services rendered, and therefore the three-year prescriptive period of article 3494 applies.

Kelley further asserts that even if the three-year prescriptive period applies, prescription would not have begun to run on his claim until Haller/Flash refused to pay Kelley his overriding royalty interest as the oil and gas was produced, and so only those obligations which were exigible more than three years prior to the filing of the reconventional demand were prescribed. However, the proposal letter which Kelley alleges entitles him to payment provides the following regarding payment of compensation:

Flash will make ½ payment upon execution of contracts consummating the trade or agreement with third party. Flash will make the other ½ payment upon project financing.

Thus, assuming that Kelley provided a lead to Flash or Haller which entitled him to compensation, he was entitled to have half of the 0.5% overriding royalty interest assigned to him upon execution of the contracts with the third party and to have the other half assigned upon project financing. According to the record, Pennington Well #1 was producing by November 1, 2004, Pennington Wells #2 and #3 were producing by April 2006. Thus, if payment was owed under the terms of the proposal letter, that payment was exigible more than three years prior to the filing of the reconventional demand, and any claim for that payment was prescribed.

Finally, Kelley argues that his reconventional demand is not prescribed because prescription was interrupted by his filing of claims against Flash and Haller in two other lawsuits. Prescription is interrupted when an obligee commences action against an obligor, in a court of competent jurisdiction and venue. La. C.C. art. 3462. Comment (b) to article 3462 states that filing suit interrupts prescription "as to the causes of action therein sued upon." Further, an interruption of prescription resulting from the filing of a suit continues as long as the suit is pending; however, this interruption is considered never to have occurred if the plaintiff abandons the suit. La. C.C. art. 3463.

The first lawsuit referred to by Kelley was a reconventional demand he filed against Haller in a lawsuit filed by Haller against Kelley, Kelley's wife, and CTI Custom Finishes, a limited liability company of which Kelley was the managing member, for the balance remaining on two promissory notes. In his reconventional demand, Kelley and his wife sought compensation for services performed on different wells than the ones at issue in this suit. Although both reconventional demands involved claims for payment for services rendered, they do not involve the same facts and are

not the same causes of action. Thus, prescription was not interrupted on the claims at issue in this case by the filing of the earlier suit.

The second lawsuit referred to by Kelley appears to involve the same cause of action as the claims made in this case; however, this suit was dismissed for abandonment on March 19, 2010. As such, any interruption of prescription which would have occurred due to the filing of the second lawsuit on August 31, 2006 is considered to have never occurred and could not have made Kelley's reconventional demand at issue in this case timely.

CONCLUSION

The judgment of the trial court dismissing Kelley's reconventional demand as prescribed is affirmed. Costs of this appeal are assessed to plaintiff-in-reconvention, Harvey A. Kelley, Jr.

AFFIRMED.